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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1541

ROBERT REID and NADIA ALICE REID,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF DANIEL PEREZ ECHEVERRIA AMICUS CURIAE FOR PETITIONERS

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SUMMARY OF ARGUMENT

Amicus Curiae contend, as the Court held in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966), that the overriding intent of Congress when it enacted §241(f) was to reunite families composed in part of U. S. citizens or aliens lawfully admitted for permanent residence. Congress was therefore willing to forgive a minor fraud such as a false claim to citizenship in the interest of promoting

"family unity." Strict application of the other ameliorative provisions of the Immigration and Nationality Act would deny relief from deportation to aliens who would be otherwise eligible for §241(f) relief. Given the overridding intent of Congress to promote family unity, it is inconceivable that Congress could have intended such a harsh result to follow. Therefore, it is submitted that Congress intended §241(f) to supplement the other ameliorative provisions of the Act, so as to provide relief in instances where it would otherwise be denied because of the strict application of the other ameliorative provisions of the Act.

In addition, Amicus Curiae contend that the fraud in procuring "entry" by falsely claiming United States citizenship is directly analogous to the fraud practiced by the Respondents in *Errico, supra*. In *Errico*, the Court held that the overriding humanitarian interest in promoting family unity saved an alien from deportation despite the fact that he entered the United States through a fraudulently obtained immigrant visa, provided that he was "otherwise admissible" at the time of entry. The Court implied that the administrative laxity which prevented Errico's fraud from being discovered until after he had established a family in the United States should not work a forfeiture of the rights of his family composed in part of United States citizens.

A central point in Petitioner's claim in *Errico* was that he submitted himself to inspection by the Immigration officers and afforded them an opportunity to discover his fraud. In this respect, an entry through

a false claim to citizenship is no different from an entry via a fraudulently obtained immigrant visa.

Section 241(f) applies in the case of an alien who procures a "visa, or other documentation *or entry*" [emphasis added] by fraud or misrepresentation. While the literal language of §241(f) could be construed to require the application of §241(f) to *all* forms of illegal entry, it is reasonable to conclude that Congress intended §241(f) to apply only in cases where the aliens afforded the Immigration authorities a chance to inspect and exclude them. In keeping with the Court's decision in *Errico* and the legislative intent of §241(f) we submit that the case of an alien who falsely claims United States citizenship during an inspection at a Port of Entry is a logical stopping place for the application of §241(f).

ARGUMENT

I

SECTION 241(f) WAS INTENDED TO SUPPLEMENT THE OTHER AMELIORATIVE PROVISIONS OF THE IMMIGRATION AND NATIONALITY ACT, AND IS THUS IN CONCERT WITH THE OVERALL STATUTORY SCHEME OF THE ACT.

The Service raises the specious argument that promoting "family unity" was not the overriding factor which prompted Congress to enact §241(f). This argument flies in the face of the express Legislative history of §241(f) and the unequivocal language in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). The Service argues that this

policy of promoting family unity, regardless of its desirability must necessarily be subordinated to the interests of maintaining the integrity of the Immigration procedures.[1] Further, the Service argues that to grant an automatic waiver of deportation charges to an alien who enters through a false claim to citizenship conflicts with the other ameliorative provisions of the Immigration and Nationality Act.[2] Accordingly, Congress could not have intended that an alien who entered through a false claim to citizenship should take greater benefits than one who submitted himself for inspection and subjected himself to the discretion of the Attorney General.

The Service's argument conflicts with this Court's opinion in *Errico, supra.* In addition, it overlooks the fact that §241(f) by its very nature contemplates inspection, albeit retroactive, in order for the alien to establish that he was "otherwise admissible" at the time of entry. The term "otherwise admissible" refers to inadmissibility on generally applicable mental, moral and physical grounds. See *Immigration and Naturalization Service v. Errico,* 385 U.S. 214 (1966). These "qualitative" grounds of excludability are by their very nature not easily extinguishable by time; they are readily documented, as in the case of a conviction for a crime involving "moral turpitude." See 8 U.S.C. §1182(a) (9). A retroactive inspection as is

[1]Respondent's brief pp. 17-22.

[2]§244 of the Immigration and Nationality Act, 8 U.S.C. §1254, "Suspension of Deportation" and §245 of the Act, 8 U.S.C. §1255, "Adjustment of Status."

required in a §241(f) case is functionally no different from that required in a §245 case.[3]

Moreover, the Service's argument displays a misunderstanding of the role §241(f) plays in the statutory scheme of the Immigration and Nationality Act. The forerunner to §241(f), §7 of the 1957 Act, identified the primary beneficiaries of the provision as ". . . mostly Mexican Nationals. . . . H.R. Rep. No. 1199, 85th Cong., 1st Sess. p. 11, U.S. Cong. & Admin. News 1957, p. 2924. The Legislative history indicates that §241(f) was not intended to change the substance or intent of §7. *Errico, supra,* at 223. Another ameliorative provision of that Act, §245, specifically precludes relief to Natives of the Western Hemisphere, and the islands adjacent thereto. Similarly, §244 precludes relief to any native of any country contiguous to the United States unless the alien can establish that he is ineligible to receive a "special immigrant visa."[4] Therefore, Congress intended §241

[3]The other grounds of excludability are contained in 8 U.S.C. §1182(a)(1)-(31). Note that since §241(f) by its terms requires the alien to establish that he was "otherwise admissible" at the time of entry, the burden is necessarily on him to provide the requisite documentation.

[4]Section 244 of the Act provides that the Attorney General in his discretion can suspend the deportation of an alien who "has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all such period he was and is a person of good moral character; and is a person whose deportation, in the opinion of the Attorney General would result in extreme hardship to the alien, his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . .

(f) No provision of this section shall be applicable to an alien who . . . (3) is a native of any country contiguous to the United States, or any island named in §101(b)(5): *Provided* that the

(f) to supplement the other ameliorative provisions of the Immigration and Nationality Act so as to provide relief from deportation in cases where it would normally be denied because the alien was born in the wrong Hemisphere or because he committed a minor "fraud or misrepresentation" in obtaining entry.[5]

II

THE APPLICATION OF THE WAIVER PROVISIONS OF §241(f) TO ALIENS WHO GAINED ENTRY BY CLAIMING CITIZENSHIP IS CONSISTENT WITH THE EXPLICIT LANGUAGE OF THE STATUTE AND THE CONGRESSIONAL INTENT.

Implicit in the Service's brief and in its contentions throughout this proceeding is the argument that a ruling that applies §241(f) to the Reids will inevitably apply to all forms of illegal entry into the

Attorney General may in his discretion agree to the granting of Suspension of Deportation to any alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to receive Special Immigrant visa."

Section 245 of the Act provides that "The status of an alien . . . who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved . . . . (c) The provisions of this section shall not be applicable to any alien who is a native of any Country of the Western Hemisphere, or of any adjacent island named in §101(b)(5)."

[5]Since both provisions require the discretion of the Attorney General and §244 requires that the alien be a person of "good moral character," even a minor fraud or misrepresentation such as a false claim of citizenship, would preclude relief under these provisions. *Orlando v. Robinson*, 262 F.2d 850 (C.A. 7, 1959); *Arakas v. Zimmerman*, 200 F.2d 322 (C.A.2, 1952).

United States. The Service's argument infers that such a ruling overrules *Monarrez-Monarrez v. Immigration and Naturalization Service*, 472 F.2d 119 (C.A.9, 1972), thereby "opening up the floodgates" to illegal alien traffic into the United States. This argument ignores the explicit language of the statute, the express legislative history of §241(f) and the major substantive differences among the types of illegal entry into the United States which can arise in a §241(f) context.

The reported cases to date have dealt with four functionally different types of entry.

First, there is the case of an entry by an alien who has submitted himself to the immigrant visa screening procedures, actually obtained a visa, albeit by fraud and entered the United States on the basis of that visa. This was the factual situation in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). §241(f) is clearly applicable to this type of case. *Godoy v. Rosenberg*, 415 F.2d 1266 (C.A. 9, 1969).

Secondly, there are the extreme instances, involving totally surreptitious entry (the so-called "wet-back" or "stowaway" cases). These cases involve aliens who enter the United States by stealth through our contiguous land borders, or escape detection from Immigration Officers at Ports of Entry. While this Court has never faced the question of the applicability of §241(f) to an alien who enters surreptitiously, two circuits have held §241(f) inapplicable to aliens seeking relief from deportation on the basis of

such entry. See *Monarrez-Monarrez v. Immigration and Naturalization Service, supra* (surreptitious entry by concealment in the trunk of a car); *Gambino v. Immigration and Naturalization Service,* 119 F.2d 1355 (C.A.2, 1972), cert. denied, 399 U.S. 905 (entry as a stowaway).[6]

A third major category of §241(f) cases involve aliens who originally entered the United States based upon a temporary non-immigrant visa, overstayed, and then sought to invoke §241(f) as a defense to deportation by alleging that they had the requisite fraudulent intent to overstay at the time of their initial entry. The appellate case law on this type of §241(f) case has been inconsistent. For instance, the Ninth Circuit in *Muslemi v. Immigration and Naturalization Service,* 408 F.2d 1196 (C.A.9, 1969) held that §241(f) was applicable to the "overstay"

[6]In *Monarrez-Monarrez, supra,* the Court refused to hold §241(f) applicable to an alien who entered surreptitiously in the trunk of a car in that such a totally surreptitious entry did not constitute "fraud or misrepresentation" within the purview of §241(f). At the same time, the *Gambino* case can be distinguished from *all* other §241(f) cases since 8 U.S.C. §1182(a)(18) sets up an entirely separate ground for exclusion for "aliens who are stowaways". In fact, the Court in *Gambino* distinguished *Errico, supra* on that very ground and held §241(f) inapplicable, reasoning that *Errico* applied only to aliens excludable at the time of entry under 8 U.S.C. §1182(a)(19)(20) or (21) and not to aliens excludable under 8 U.S.C. §1182(a)(18).

Without delving into the Court's reasoning in *Monarrez and Gambino* those cases cannot govern the instant case. In neither of those cases did the alien confront an Immigration officer for inspection. In *Reid,* as in *Echeverria,* Petition for Cert. presently pending before this Court, No. 73-1917, the aliens put the Immigration officer on notice that they were coming to the United States to reside permanently, else they would not have claimed United States citizenship. The officer was thus afforded an opportunity to exercise his right to investigate and inevitably exclude them as aliens pursuant to 8 C.F.R. §235.1(b), 8 U.S.C. §1225.

situation. In 1971 this position was reaffirmed by the court in *Vitales v. Immigration and Naturalization Service,* 443 F.2d 343 (C.A.9, 1971). However, the United States Supreme Court meanwhile granted certiorari in *Vitales,* and the original *Vitales* decision was vacated as moot when the alien left the country. *Immigration and Naturalization Service v. Vitales,* 405 U.S. 983 (1972).

Later, however the Ninth Circuit rejected its previous ruling in *Vitales* and held §241(f) inapplicable in the "overstay" cases. *Cabuco-Flores v. Immigration and Naturalization Service,* 477 F.2d 108 (C.A.9, 1973), cert. denied, 414 U.S. 841. In *Cabuco-Flores, supra,* the Court purported to reaffirm its holding in *Muslemi, supra,* but then proceeded to distinguish the facts in *Muslemi,* from the facts before it. Thus, the clear result of *Cabuco-Flores* is to refuse §241(f) relief to all aliens who enter with a temporary visa and then overstay.[7]

[7]The Court in *Cabuco-Flores* sought to distinguish *Muslemi,* reasoning that deportation charges were brought against Muslemi one day prior to the expiration of his temporary visa, on the ground that he was excludable at the time of entry in that he entered as an "immigrant," i.e., with the intention of remaining permanently, and that he did not then possess a valid immigrant visa. 8 U.S.C. §1251(a)(1). In *Cabuco-Flores,* on the other hand, the alien was deportable for having overstayed the time permitted on his temporary non-immigrant visa. *Cabuco-Flores, supra* at 110-111. The Court reasoned that in *Muslemi* the Government was required to prove that Muslemi entered with the intent to remain permanently in order to establish that he was excludable for entering as an "immigrant" without a valid immigrant visa. 8 U.S.C. §1251(a)(1), 8 U.S.C. §1182(a)(20). The "fraud" was therefore "germane" to the deportation charge.

In contrast, the Government in *Cabuco-Flores* was only required to prove that the alien had overstayed. For obvious reasons *Cabuco-Flores* effectively negates the benefit an alien would

Finally, there are the *Reid* and *Echeverria* situations of aliens who enter by falsely claiming United States citizenship to an Immigration officer during an inspection at a Port of Entry. Of the cases which have considered §241(f) in this context, only the divided opinion in *Reid* has agreed with the Service's contentions that §241(f) should not be applicable. At least five other Federal appellate decisions have expressly held the contrary and found that §241(f) was applicable. *Lee Fook Chuey v. Immigration and Naturalization Service*, 439 F.2d 244 (C.A.9, 1971); *Echeverria v. Immigration and Naturalization Service* (Opinion unpublished) C.A.9, Feb. 27, 1974, (Petition for Cert. presently pending before this Court, No. 73-1917); *Gonzalez de Moreno v. United States Immigration and Naturalization Service*, 492 F.2d 532 (C.A.5, 1974); *Gonzalez v. Immigration and Naturalization Service*, 493 F.2d 461 (C.A.5, 1974); *United States v. Osuna-Picos* 443 F.2d 907 (C.A.9, 1971).

The Service implicitly argues that these "false claim to citizenship" cases must inevitably be lumped with the "surreptitious entry cases and the "overstay" cases, and that a ruling in favor of the Reids will open a Pandora's box to the necesssary application of §241(f) to all forms of illegal entry. We submit that this is not so.

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derive from the *Muslemi* opinion. The Service need only be careful to bring deportation proceedings under 8 U.S.C. §1252(a)(2), rather than 8 U.S.C. §1251(a)(1) in order to avoid the application of §241(f).

It is important to note that the Court in *Cabuco-Flores* affirmed the ongoing validity of *Lee Fook Chuey v. Immigration and Naturalization Service*, 439 F.2d 244 (C.A.9, 1971) a case virtually identical to *Reid* and *Echeverria*.

While the term "entry" as defined in the Act, 8 U.S.C. §1101(a)(13), could conceivably apply to any of the above three types of cases, a reasonable distinction among the three categories of cases can be drawn on the basis of the express legislative history of §241(f).

The House Committee Report that accompanied §241(f) when it was originally adopted as part of the 1957 Amendments to the Immigration and Nationality Act explicitly stated that the primary purpose in adopting §241(f) was to grant relief from deportation to:

> ". . . mostly Mexican Nationals who, during the time when *border-control operations* suffered from *regrettable laxity* were able to enter the United States [and] establish a family in this country. . . ." H.R. Rep. No. 1199, 85th Cong., 1st Sess., U.S. Cong. and Admin. News 1957, p. 2024 (emphasis added).

In view of this language, it is logical that Congress was referring to entries through a *Port of Entry* when it referred to "border control operations." Otherwise the effect of the statute would be to impose an admittedly overwhelming burden on the Service to patrol literally every mile of our five thousand miles of contiguous land borders with Canada and Mexico at the risk of being unable to deport an alien if one slipped across the border.

In addition, the statute logically refers only to those entries through a Port of Entry where the Service is reasonably put on notice that the applicant is

potentially coming into the United States *for permanent residence.*[8]

Accordingly, the so-called "wet-back" cases do not fall within the purview of §241(f) because the entry did not take place through a Port of Entry; the "overstay" cases similarly fall outside the purview of §241(f) in that the Service is not put on notice at the time of original entry that the alien is potentially entering with the intention to remain permanently. These situations contrast with the instance of an alien entry based on a false claim to citizenship made to an Immigration officer at a Port of Entry. An entry based on a false claim to citizenship is no different from an entry with a fraudulently obtained visa. Thus, the unequivocal language of §241(f) and its Legislative history militate in favor of holding §241(f) applicable to the Reids.

[8]The Government contends (Respondent's Brief, p. 7, fn.6, p. 20) that §241(f) should be held to apply only to aliens who put the Service on notice that they are entering as aliens. They cite the instance of an alien who enters, possessing a temporary nonimmigrant visa who fraudulently conceals his intention to remain permanently. As the argument goes, since Courts have held §241(f) inapplicable to aliens who commit fraud, but at least admit their alienage and submit themselves for inspection, surely it should be inapplicable to those who conceal their alienage. The argument ignores the fact that cases of this type have generally been treated as "overstay" cases (see fn.6, *supra*) and are distinguishable from the present case. The rationale for holding §241(f) inapplicable is the fear that there is no way for the Government to ascertain at the time of entry whether the alien seeks to remain permanently, which would trigger more extensive investigatory procedures, and that it is impossible at a deportation hearing for the Government to disprove that the alien entered with the preconceived intent to remain permanently. In the case of an alien claiming to be a United States citizen, the Immigration officer is put on notice that he is coming into the United States to reside permanently. The Immigration officer is afforded the opportunity to further investigate the individual as though he were an alien if he so chooses. At a deportation hearing, the alien bears the burden of establishing all the requisite elements for §241(f) relief. The Service bears no more burden as to proof than it would have in any other proceeding.

As discussed in Section III (pages 12-16) of our opening Brief of Amicus Curiae, the Service has plenary power under the Act, see 8 C.F.R. §235.1(b) to summarily reject dubious claims of citizenship and to exclude applicants as aliens pending an exclusionary hearing pursuant to the Act. See 8 U.S.C. §1225. If the Service does not exercise its power in a situation *where it has been reasonably put on notice* that the applicant may be coming into the United States to reside permanently, its laxity in failing to adequately investigate the claim of citizenship (for whatever valid reasons related to foreign policy, domestic farm economy, or otherwise) is clearly the very *administrative laxity of enforcement* which prompted Congress to enact §241(f) in the first place.

CONCLUSION

For the reasons stated, and those in our opening brief, the opinion below should be reversed, and the *Echeverria* opinion summarily affirmed.

Respectfully submitted,

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